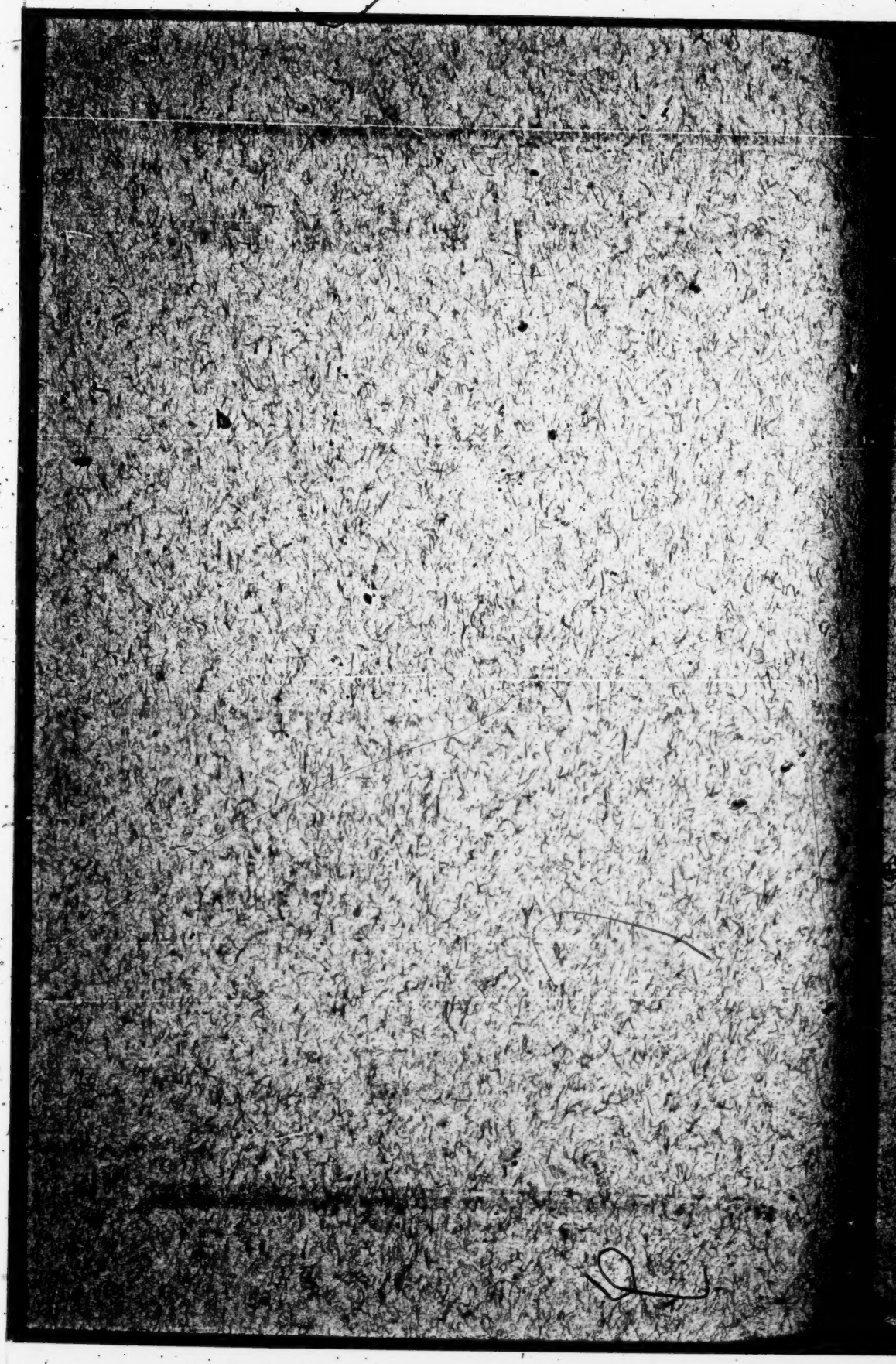

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Supreme Court of the United States

OCTOBER TERM, 1933

No. 14

W. A. YARBOROUGH, PETITIONER,

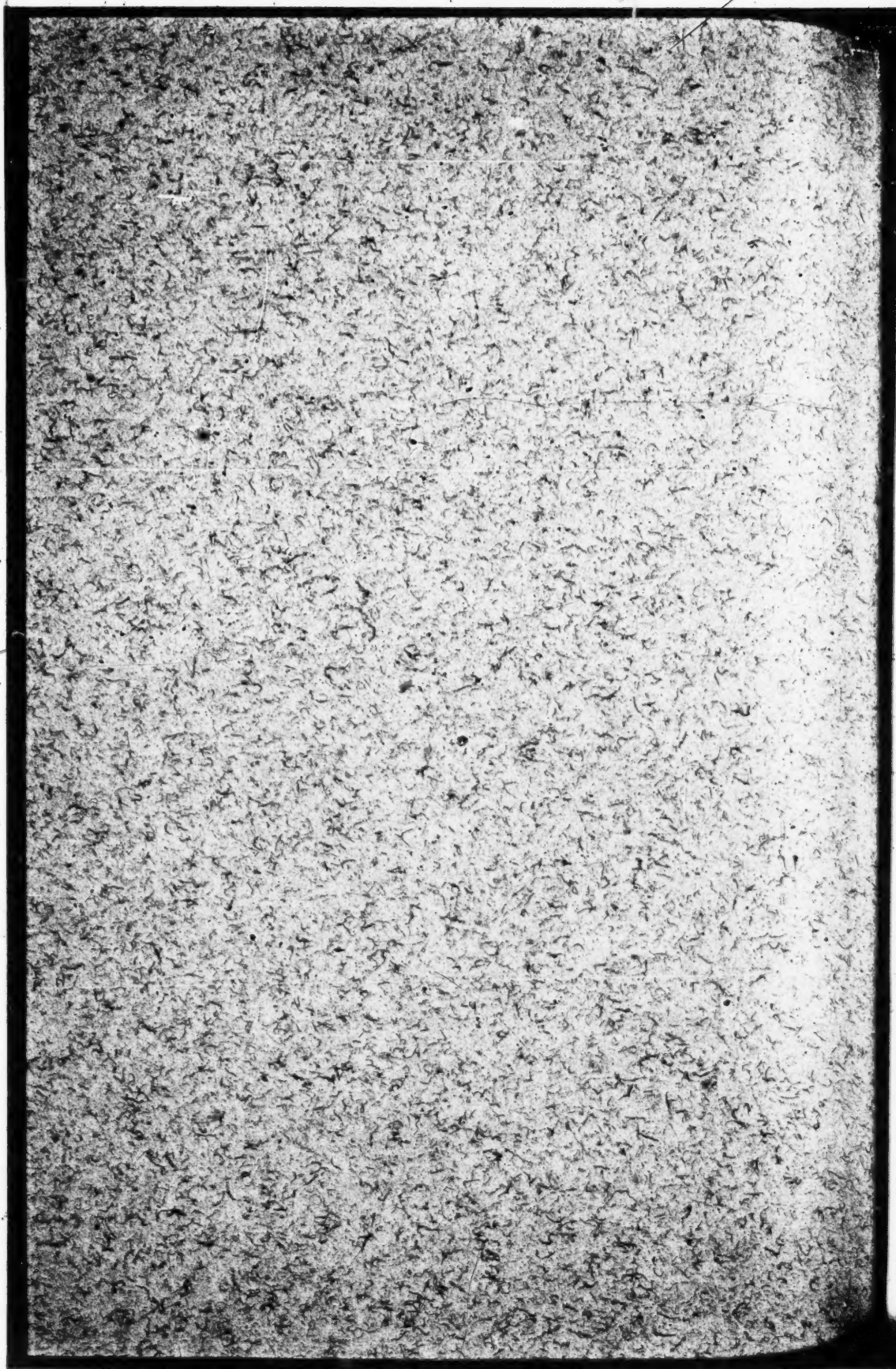
versus

SADIE YARBOROUGH, BY HER GUARDIAN AD LITEM, R. D. BLOWERS, RESPONDENT

BRIEF FOR PETITIONER

R. E. WHITING,
Columbia, S. C.,
AND STEPHEN NEWTON,
Greenville, S. C.,
Counsel for Petitioner.

THE R. L. BRYAN CO., COLUMBIA, S. C.



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BRIEF FOR PETITIONER

I

The Opinion of the Court Below

The opinion of the Supreme Court of South Carolina, including the opinion on the denial of the petition for rehearing, is officially reported in 168 S. C., 46. Both opinions are also reported in 166 S. E., 877.

II

Jurisdiction

The jurisdiction of this Court is based upon a writ of *certiorari*, which, on May 8, 1933, was granted under Sec-

tion 237, amended, of the Judicial Code (28 U. S. C. A., 344-b), to review the judgment of the Supreme Court of South Carolina, affirming the judgment of the Court of Common Pleas for Spartanburg County, South Carolina.

The answer filed by the defendant (R., page 4), as well as his exceptions on appeal to the Supreme Court (R., pages 107-108), invoked the protection of the full faith and credit clause of the federal constitution.

III

Statement of the Case

The defendant, W. A. Yarborough, and his family, consisting of his wife, Susie B. Yarborough, and their daughter, Sadie Yarborough, were living together in Atlanta, Georgia, at a home provided by defendant, for about a year before he filed suit for divorce. The family went to Atlanta about September 5, 1926 (R., page 43). The daughter attended public school for the school year 1926-27, and in June, 1927, the wife went to Hendersonville, N. C. The daughter first went to a camp at Toccoa, Ga., and later in the summer joined her mother at Hendersonville, a summer resort (R., page 44).

On September 21, 1927, Yarborough filed suit for divorce in the Superior Court of Fulton County (Atlanta Circuit), Georgia. The wife was served by publication, but, on November 25, 1927, she appeared by counsel and filed an answer and cross-bill. In her cross-bill she asked for a total divorce, the custody of the child, temporary alimony for herself and the child, and "that provision for permanent alimony be made for the support of respondent and the minor child above mentioned and for the education of said minor child." (R., page 89).

On November 26, 1927, the day after the wife's answer and cross-bill were filed, Yarborough was ordered to show cause on December 3, 1927, why temporary alimony and counsel fees should not be granted, and, on January 12, 1928, a consent order was entered requiring him to pay the wife

$125.00 per month for her support and $75.00 per month for the support of the child "until the further order of the court or the final disposition of this case." He was also ordered to pay his wife's attorneys $100.00 "on account of attorneys' fees" (R., pages 89-90).

Thereafter, on petition of Yarborough, the amount of temporary alimony was twice reduced until, by an order dated December 7, 1928, he was excused from the payment of all accrued temporary alimony and the monthly allowance for the mother and child was fixed at $50.00 per month for the months of December, 1928, and January, February, and March, 1929; and after March, 1929, it was to be increased to $100.00 per month. (R., pages 90-98).

On January 17, 1929, the first jury trial was had, resulting in a verdict for divorce (R., page 94). Two days later, January 19, 1929, a consent order was filed awarding the wife $1,750.00 and a trustee for the daughter $1,750.00 "in full settlement of temporary and permanent alimony in the case." The trustee for the daughter was to expend her allowance "in his discretion for the benefit of the minor child, including her education, support, maintenance, medical attention, and other necessary items of expenditure." It was also provided that upon compliance with this order Yarborough should be relieved "of all payments of alimony" (R., pages 94-96, where the order is given in full).

On June 7, 1929, the second and final verdict for a divorce was rendered by a jury, and on the same day an order, based upon the two concurring verdicts, was entered decreeing a total divorce (R., page 96).

The lump sum provision made for the permanent support of the wife and daughter—$1,750.00 for each—was paid by Yarborough, and represented the greater part of his entire property holdings (R., pages 54-58).

A few months after the divorce Yarborough married again. His daughter, living with her divorced mother in South Carolina, became estranged from him, and finally refused to see him (R., pages 38-41, 98).

Some fifteen months after the final decree of divorce (August 20, 1930), the daughter, Sadie Yarborough, through her maternal grandfather as guardian *ad litem*, brought this action in equity (in the Court of Common Pleas for Spartanburg County, South Carolina) against her father, W. A. Yarborough, for support. Jurisdiction of the defendant was obtained by attaching funds of his in the amount of $2,119.55. The defendant appeared generally, and, in addition to other defenses, plead in bar of the action that in the Georgia divorce proceedings he had made provision for the permanent support of his daughter; that such payment operated in full and final discharge of his obligation to support her; and that the decree in the Georgia suit was *res adjudicata* of the matter of support and binding on the South Carolina court (R., pages 1-2).

The case was heard on circuit, and a decree was entered turning over the attached funds to a trustee, to provide $50.00 per month for the minor (R., page 2). The defendant then appealed to the Supreme Court of South Carolina, and by his exceptions again raised the constitutional question (R., pages 107-108, Exceptions 1, 2, 3 and 8).

The Supreme Court of South Carolina filed its decision on June 27, 1932, affirming the decree below on two grounds —(1) that the minor daughter was not a party to the Georgia divorce suit and was not a resident of Georgia, and the Court therefore did not have jurisdiction to determine her right to support, and (2) that the decree of the Georgia Court providing for her support did not conform to the provisions of the Georgia law, and therefore was not *res adjudicata* of her right to support. (R., page 109; 168 South Carolina Reports, 46.)

The defendant then filed a petition for rehearing. This was denied on December 22, 1932, on the ground that the Georgia Court granting the divorce had no jurisdiction over the minor, and she was, therefore, not bound by the decree in the divorce suit. (R., page 121; 168 South Carolina Reports, 49.)

IV

Specifications of Error

1. The Court erred in finding and holding that the decree of the Georgia Court in the divorce action did not bind the plaintiff because it did not provide for her permanent support in the manner prescribed by the Georgia law.

2. The Court erred in finding and holding that the decree of the Georgia Court in the divorce action did not absolve the defendant from further obligation to support the plaintiff.

3. The Court erred in finding and holding that the decree of the Georgia Court in the divorce action was not binding on the Courts of South Carolina under Article IV, Section 1, of the Constitution of the United States of America.

V

Summary of the Argument

A. The decree of the Georgia Court provided for the permanent support of the child.

B. The decree of the Georgia Court absolved the father from further obligation to support the child, and is res adjudicata of the matter of the child's support.

VI

Argument

POINT A

The decree of the Georgia Court provided for the permanent support of the child.

The cross-bill filed by the wife to the husband's suit for divorce prayed for the custody of the child and "that provision for permanent alimony be made for the support of respondent and the minor child above-mentioned, and for the education of said minor child." The response to this prayer is the decree of Judge Pomeroy of January 19, 1929,

which is set out in full at pages 94-96 of the record. The first thing adjudged by the decree is that "the following settlement be hereby made the order of this Court, the same being in full settlement of temporary *and permanent alimony* in said case, and in full settlement of all other demands of every nature whatsoever between the parties." Further on in the decree it is adjudged that $1,750.00 shall be paid by Yarborough to his wife and a like amount to Blowers as trustee for the daughter, and it is adjudged that the amount paid Blowers "shall be expended by him in his discretion for the benefit of the minor child, including her education, support, maintenance, medical attention, and other necessary items of expenditure." It is further decreed that "upon the compliance with this order by the plaintiff he shall be relieved of *all payments of alimony* and counsel fees in said case", except a certain $50.00 payment due under a prior order.

The case of *Bates v. Bodie*, 245 U. S. at page 526, is authority for the proposition that "for the issues one must go to the pleadings; for the response to them and their determination, to the judgment; and that each may furnish a definition of the other."

The highest and most authoritative evidence that the term "permanent alimony", as used in the decree of Judge Pomeroy, includes the provision made for the support of the child, as well as the provision made for the support of the wife, is the fact that both the legislature and the Courts of Georgia use the term in that inclusive sense.

The caption of Section 2981 (which is the statute requiring that permanent support for children shall be provided in the divorce suit) reads: *"Alimony For Children On Final Trial."*

In numerous of the Georgia decisions "alimony" is used in referring to the provision for the support of the children as well as to that for the wife. The word is so used in *Coffee v. Coffee*, 101 Ga. 787, 28 S. E. 977. In *Gilbert v. Gilbert*, 151 Ga. 520, 107 S. E. 490, the Court speaks of "the amount allowable as alimony as support for the children." In *Gaines*

v. Gaines, 169 Ga. 432, 150 S. E. 645, the statement of facts recites that the wife prayed for "permanent alimony for the support of herself and child," and that an order had been passed requiring "the defendant to pay $20.00 per month as alimony for the support of the child." And in the prevailing opinion in that case, in referring to the *Coffee case*, the Court says that Coffee was required to pay "$5.00 monthly on account of alimony for his children." In *Pace v. Bergquist*, 173 Ga. 112, 159 S. E. 678, the Court speaks of the allowance for the child as as "an allowance in the nature of alimony," and refers to the *Coffee case* as a case where the allowance for the wife and children was "in full settlement of both temporary and permanent alimony."

The holding of the Supreme Court of South Carolina that the decree of Judge Pomeroy provided only temporary and not permanent alimony for the child seems to be based, not on the fact that Judge Pomeroy did not intend thereby to provide permanent alimony, but rather on the proposition that as matter of law such provision could not be made by a consent decree, or before the second verdict. (See the opinion, 168 S. C. at pages 56-57; Record, pages 117-118.)

It is true that Section 2981 (R., page 102), does provide that the jury, on the second or final verdict, shall fix the permanent alimony for the children, but it is equally true that the Supreme Court of Georgia has through a long line of cases held that a consent decree, fixing such permanent alimony, is just as efficacious as the verdict of a jury.

In *Coffee v. Coffee*, 101 Ga. 787, 28 S. E. 977, by a consent decree in a divorce suit, permanent alimony was provided for the children, and thereafter a decree of divorce was entered. Subsequently the father sought to be relieved of the alimony payments. It was held that the decree was *res adjudicata* of the matter of support, and the father could not be relieved of the judgment. Said the Court:

> "In the present case the parties dispensed with a jury trial upon the question of an allowance of per-

manent alimony, and by consent invoked a decree of the Court fixing the allowance upon the terms stated in the decree. This consent having been approved by the Court in which the cause was pending, after the grant of the divorce the Court loses control over the subject, and the decree stands as other judgments against the husband."

To the same effect see:

Johnson v. Johnson, 131 Ga. 606, 62 S. E. 1044.
Gilbert v. Gilbert, 151 Ga. 520, 107 S. E. 490.
Robison v. Robison, 29 Ga. App. 521, 116 S. E. 19.
Sikes v. Sikes, 158 Ga. 406, 123 S. E. 694.
Hooten v. Hooten, 168 Ga. 86, 147 S. E. 373.
Gaines v. Gaines, 169 Ga. 432, 150 S. E. 645.
Pace v. Bergguist, 173 Ga. 112, 159 S. E. 678.

It would seem that the Supreme Court of South Carolina entirely misconstrued the holdings in the *Gilbert case* and the *Pace case*. When the Court says in the *Gilbert case* that it is the duty of the jury to fix the permanent alimony, it is merely saying that the matter of fixing the permanent alimony is one of fact, and whether fixed by the Court by a consent decree, or by the jury by a verdict, it is a matter of fact, and as such cannot be altered by the Court. The permanent alimony in that case was actually fixed by a consent decree, and not by the jury. In the *Pace case* there was a consent order granting the child $30.00 per month "until the further order of the Court." This was held to be an order for the payment of temporary alimony, and as there was no subsequent decree granting the child permanent alimony, and temporary alimony stops with the final decree of divorce, it was held that the father was not guilty of contempt for refusing to continue the $30.00 payments after the final decree.

POINT B

The decree of the Georgia Court absolved the father from further obligation to support the child, and is res adjudicata of the matter of the child's support.

Sections 2981 and 2982 of the Georgia Code of 1926, annotated, read as follows:

> "Sect. 2981 (Sect. 2462) ALIMONY FOR CHILDREN ON FINAL TRIAL.—If the jury, on the second or final verdict, find in favor of the wife, they shall also, in providing permanent alimony for her, specify what amount the minor children shall be entitled to for their permanent support; and in what manner, how often, to whom, and until when it shall be paid; and this they may also do, if, from any legal cause, the wife may not be entitled to permanent alimony, and the said children are not in the same category and when such support shall be thus granted, the husband shall likewise not be liable to third persons for necessaries furnished the children embraced in said verdict who shall be therein specified."
>
> "Sect. 2982. (Sect. 2463) JUDGMENTS, HOW ENFORCED.—Such orders, decrees, or verdicts permanent or temporary, in favor of the children or family of the husband, may be enforced as those in favor of the wife exclusively."

In *Maddox v. Patterson*, 80 Ga. 719, 6 S. E. 581, the minor child of a deceased father claimed a year's support out of his estate as against creditors. It was objected that the child was not entitled because it was in the custody of the mother under a decree of absolute divorce. The Court held in favor of the child, saying:

> "The judgment of divorce did not grant alimony, either permanent or temporary, to the wife or the child; and so far as appears there was no discharge of the father from his obligation to support his child."

In *Coffee v. Coffee*, 101 Ga. 787, the father petitioned to be relieved from certain permanent alimony payments in favor of his children provided for in a consent decree in a divorce suit. In holding that he could not be relieved, the Court said:

> "The allowance for the support of these children rested upon a contract, which, receiving the sanction of the court by judicial decree, imposed upon the husband the responsibility with which he was already charged by law, namely, the support of the children. . . . She became by virtue of this decree, in her capacity as trustee for her minor children, a judgment creditor, and the court could no more vacate that judgment so rendered in her favor than it could vacate a judgment rendered against the husband in favor of a creditor of his upon any other account. Whatever right of revision of this decree may have existed was extinguished by the grant of the total divorce."

The doctrine of the *Coffee case*, that a consent decree granting permanent alimony to minor children, entered in a suit resulting in a decree of divorce, is *res adjudicata* of the matter of the children's support, has been repeatedly affirmed and is the settled law of Georgia.

Johnson v. Johnson, 131 Ga. 606, 62 S. E. 1044.
Brown v. Brown, 132 Ga. 712, 64 S. E. 1092.
Wilkins v. Wilkins, 146 Ga. 382, 91 S. E. 415.
Gilbert v. Gilbert, 151 Ga. 520, 107 S. E. 490.
Robison v. Robison, 29 Ga. Apps. 521, 116 S. E. 19.
Sikes v. Sikes, 158 Ga. 406, 123 S. E. 694.
Hooten v. Hooten, 168 Ga. 86, 147 S. E. 373.
Gaines v. Gaines, 169 Ga. 432, 150 S. E. 645.
Pace v. Bergquist, 173 Ga. 112, 159 S. E. 678.

In *Exchange Banking & Trust Co. v. Finley*, 73 S. C. 423, the Supreme Court of South Carolina recognizes, without discussion and as a matter of course, that a judgment in divorce proceedings in the State of Illinois absolved the father from further obligation to support his child.

In *Mayer v. Mayer*, 154 Mich. 386, 19 L. R. A. N. S. 245, the wife obtained a divorce in Oklahoma. It awarded her the custody of the children, and required the husband to pay her a certain monthly sum during her life or until she married again, and also to pay a certain sum monthly

for the support of the children until the children came of age "or until the further order of the court." After the divorce proceedings the wife took the children and moved to New York, while the husband went to Detroit. The wife later moved to Detroit and brought this suit for arrears of alimony due her as well as the children. The Court held that she was entitled to a judgment for the alimony due her, since the award of the Oklahoma Court was a final judgment, but that the complaint should be dismissed as to the alimony due the children because the award of the Oklahoma Court was not a final judgment, being subject to modification at any time by that Court. From the opinion it is clear that the fact that the children were not formal parties to the Oklahoma divorce suit was not a factor in the decision, and the Court would have sustained a judgment for the children's alimony if the Oklahoma judgment had been a final judgment as to the children's alimony.

In *Sistare v. Sistare*, 218 U. S. 1, the wife obtained a decree of separation and for alimony of $22.50 per week for the support of herself and a minor child in the Courts of New York. She thereafter sued the husband in Connecticut for arrears of alimony. She obtained judgment, which was reversed by the Supreme Court of the State, and the case went to the United States Supreme Court. This Court held that the decree for alimony for the mother and child was a final decree, not subject to modification, and being such the Courts of Connecticut were bound, under the full faith and credit clause of the federal constitution, to recognize it, and, therefore, that the wife was entitled to enforce the judgment in the Connecticut action.

All of the foregoing cases are authoritative, either expressly or by clear and necessary implication, for the proposition that it is not necessary for a child to be a formal party to its parents' divorce suit in order for the child's right of support to be finally adjudicated.

The matter of the actual residence of the child would seem to have nothing to do with the Court's jurisdiction to ad-

judicate the matter of support. In divorce cases the Court deals with a status, a relationship, and if it has personal jurisdiction of the parents, it has complete jurisdiction to destroy the relationship, and incidentally to deal finally with the matter of support of the children. The State of Georgia, therefore, having the power to fix the allowance for the permanent support of the child of divorced parents, and the State having exercised that power by a statutory enactment, specifying how such permanent support shall be fixed, and that when so fixed the father shall be absolved from further liability to support the child, the child is as much bound thereby as if it had been a formal party to the suit.

What actually happens in such a case is that the obligation to support, imposed by the State, is removed by the State. In so doing the State does not act upon the child, who may be beyond the jurisdiction, but upon the father, who is within the jurisdiction.

Under the decree of divorce the custody of Sadie Yarborough was given to her mother. The obligation to support the child passed from the father to the mother, apart from the sum given the trustee for the support of the child. See *Thompson v. Ga. Ry. & Power Co.*, 163 Ga. 598, 136 S. E. 895, where it is said, in accordance with the general law, that the duty of the parent to support the child, and the right of custody are reciprocal. In *State v. Lancaster*, 135 S. C. 412, it was held that a father is required to support his children only at his residence. As Sadie Yarborough, at the time she brought this suit, was living with her mother in South Carolina, who was charged with the duty of supporting her, it is difficult to see why the Courts of South Carolina should insist upon also charging her father, a non-resident, who was not entitled to her custody, with her support. It cannot be questioned that after the divorce Yarborough was not liable for the support of his minor daughter at his residence (Georgia), and under the *Lancaster case* he was not liable to support her in any other place (South Carolina).

Under such circumstances, for the Courts of South Carolina to refuse to recognize that, as a result of the Georgia divorce and the proceedings therein, Yarborough was absolved from the obligation to support his minor daughter, amounts to imposing upon a non-resident a greater burden than is imposed upon the resident, and is a denial to the non-resident of the benefit of the rule of law which is applied to the resident in the *Lancaster case.*

Further, there is no South Carolina decision or statute, and none is indicated in the opinion of the Supreme Court, permitting a child to bring a direct action in equity against its father for support. There is no such right of action.

Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146.
Alling v. Ading, 52 N. J. Eq. 92, 27 Atl. 655,
Hooten v. Hooten (1929), 168 Ga. 86, 147 S. E. 373.

We also maintain that as matter of law and fact the child's legal domicil was in Georgia at the time of the divorce. Her father's domicil was there, and her domicil followed his. *Lamar v. Micou,* 112 U. S. 452. Even as to the wife, her domicil was with her husband. A mere voluntary separation does not operate to give the wife a separate domicil. *Barker v. Barker,* 21 How. 582. In this connection, see *Anderson v. Watt,* 138 U. S. 694, 706, where it is said: "And although the wife may be residing in another place, the domicil of the husband is her domicil. Story, Confl. Laws, sec. 46; Wharton, Confl. Laws, sec. 43; and cases cited. Even where a wife is living apart from her husband without sufficient cause, his domicil is in law her domicil."

Neither in the record of the Georgia divorce proceedings, nor in the testimony given in the present case, do we find any facts sufficient to take the wife out of the application of the rule, prior to the granting of the divorce decree. Obviously, the child's living with her mother in Hendersonville, N. C. at the time of the commencement of the divorce suit was not sufficient, of itself, to change the child's domicil from the State of Georgia. It was not until the decree of the Georgia Court allowing the mother the custody of the child,

that the child acquired a different domicil from that of her father.

CONCLUSION

The judgment in the Georgia divorce suit was res adjudicata of Sadie Yarborough's right to support from her father, W. A. Yarborough, and was a bar to this action; and the failure of the Supreme Court of South Carolina so to hold was a violation of W. A. Yarborough's rights under the full faith and credit clause of the federal constitution, entitling him to a reversal of the judgment below.

R. E. WHITING,
STEPHEN NETTLES,
Counsel for Defendant.

APPENDIX

REFERENCES TO RECENT GEORGIA DECISIONS APPLICABLE TO SHOW THE SCOPE AND EFFECT OF DIVORCE DECREES UNDER GEORGIA STATUTES TO DETERMINE MATTERS OF PARENTAL RIGHTS AND OBLIGATIONS

Pace v. Bergquist

(173 Ga. 112, 159 S. E. 678)

A consent order in the case, issued during the pendancy of the divorce proceedings, contained a provision requiring a payment by the father of $30.00 per month "until the further order of the court" for the support of the minor child. The final verdict and decree for divorce did not provide for alimony for either wife or child. The father—failing thereafter to keep up the payments for the support of the child—was adjudged in contempt. The decision of the Georgia Supreme Court reversed the ruling of the Court below, stating the grounds for such reversal as follows:

"1. The effect of the judgment granting temporary alimony to the mother for the child, in stated monthly payments 'until further order of the court,' when construed in connection with Civil Code 1910, Sec. 2978, was that the payments should continue, under the supervisory power of the court to modify or revoke the same, until final judgment, when the payments would cease altogether by operation of law. *Holleman v. Holleman,* 69 Ga. 676; *Osborne v. Osborne,* 146 Ga. 344, 91 S. E. 61; *Black v. Black,* 150 Ga. 672, 104 S. E. 775. The fact that the judgment was rendered by consent did not extend the force and effect of the judgment beyond the final verdict and decree in the divorce case. Such judgment contemplates alimony pending the cause. *Higgs v. Higgs,* 144 Ga. 20, 85 S. E. 1041.

"2. After the wife obtained the decree of total divorce, the matrimonial relation no longer existed, and she could not thereafter obtain an order or judgment

requiring her former husband to pay to her alimony, or an allowance in the nature of alimony, in order that she might support their minor child, whose custody had been awarded her under the above order or judgment granting temporary alimony for the support of the child. *Hall v. Hall,* 141 Ga. 361, 80 S. E. 992; *Watson v. Watson,* 168 Ga. 573, 148 S. E. 386. . . .

"3. Where the wife, on account of the misconduct of the husband, obtains an order granting her temporary alimony for the support of their minor child and awarding her custody of such child, and afterwards obtains a verdict and decree granting to her a total divorce, without any provision requiring the father to pay permanent alimony for the support of the child, the father is not relieved of his legal obligation for the proper support of their child; and, if he fails or refuses to discharge this obligation, the mother, in an original action, may recover of the father the amount of expenditures made by her after such decree for the proper support of their child. *Brown v. Brown,* 132 Ga. 712, 64 S. E. 1092; *Hall v. Hall, supra; Hooten v. Hooten,* 168 Ga. 86, 147 S. E. 373."

Gaines v. Gaines

(169 Ga. 432, 150 S. E. 645)

In a suit commenced July 27, 1927, an order was made, of date August 10, 1927, granting the wife $50.00 per month as temporary alimony for the support of herself and minor child. On March 19, 1929, an order was made, awarding the custody of the child to the mother and requiring the defendant to pay $20.00 per month as alimony for the support of the child for five years and thereafter to pay $25.00 per month until the child should have reached eighteen years of age. Counsel for both parties consented in writing to the entry of this decree, which recited that it was made pursuant to the agreement of counsel.

On April 5, 1929, Mrs. Gaines filed a motion (through other counsel) to vacate this decree on the ground that it was entered without her knowledge and consent, and that her counsel had no authority to consent to it, and that she was entitled to a larger amount. Another ground of the motion was that the decree for alimony was rendered by the Court without a jury; that the matter should have been submitted to a jury; and that the decree made in the suit for alimony forfeited the rights of the child for a period of three years during minority.

An order vacating the judgment for permanent alimony, and granting a new trial, was sustained—under a majority opinion of the Supreme Court—on the ground that "the judgment vacated was rendered on March 19, 1929, and the petition to vacate was filed April 5, 1929; both dates being within the same term of the Superior Court of Fulton County, to wit: the term beginning on the first Monday in March. Therefore, it not appearing that the discretion of the trial Court was abused, the judgment will be affirmed". Commenting on the case of *Coffee v. Coffee*, 101 Ga. 787, 28 S. E. 977, it was pointed out that "the original judgment in that case was rendered at the January term, 1891, and the motion to abrogate or modify the decree was made at the July term, 1896".

A dissenting opinion by Justices Beck and Atkinson was to the effect that the consent order fixed the allowance for permanent support; disposed of the question of permanent alimony; stood upon the same footing as the finding of the jury provided for in Section 2981; and that "the judge had no more authority to alter this judgment than he would have had to set aside a verdict of the jury making an allowance for permanent alimony".

Under either of the above referred to opinions, there can be no doubt whatever, it would seem, as to the final and binding effect of a consent decree determining the extent of the father's parental obligation for the support of a child awarded to the custody of the mother. The consent having

been approved by the Court in which the case was pending, the decree stands as other judgments; and cannot be questioned, after the termination of the case in which the judgment was rendered, except upon such charge of fraud or collusion as to vitiate the judgment.

Hooten v. Hooten

(168 Ga. 86, 147 S. E. 373)

The petition of the children, by their mother, as next friend, sought an allowance of $100.00 per month as permanent support. The father demurred upon the grounds: "(a) The petition is not authorized by law. (b) There is no provision of law authorizing or sanctioning it. (c) It sets forth no cause of action. (d) Children cannot sue their father for support by themselves or their next friend where there is a total divorce between their father and mother. (e) It appears from the petition that the divorced wife of the defendant is suing for a sum named, for herself for the support of the children, which she has no right to do." The Court sustained the demurrer and dismissed the petition.

This ruling was sustained in an opinion by the Georgia Supreme Court, wherein it was said:

> "We must further determine the law fixing the extent of the father's duty to support and educate his minor children. 'Until majority, it is the duty of the father to provide for the maintenance, protection, and education of his child.' Civil Code 1910, Section 3020. So, generally, it is the duty of the father, having the ability to do so, to support his minor children. . . . This is so because it is his duty, under the above Section of the Code, to furnish such support if he is able.
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> "To this general rule there are exceptions. One of these grows out of the principle that the duty to support and the right to the custody and the earnings of his minor children are reciprocal (Civil Code 1910, Section 3020, 3021; 46 C. J. 1256, Section 34), and

that whatever deprives the parent of the right to the custody and services of the child, without fault on his part, relieves him from the duty to support the child (*Thompson v. Georgia Ry. & Power Co.*, 163 Ga. 598, 602, 136 S. E. 895). Another exception arises where the parents have been divorced, and provision for the support of the children has been provided in the divorce proceeding. In suits for divorce, the judge presiding may, either in term or vacation, grant alimony, or decree a sum sufficient for the support of the family of the husband dependent upon him, and who have a legal claim upon his support, as well as for the support of his wife; . . . and in case a sum is awarded for the support of said family, the husband shall not be liable to third persons for necessaries furnished them.' Civil Code 1910, Section 2980. If the jury trying a divorce case on the final verdict find in favor of the wife, they shall also, in providing permanent alimony for her, specify what amount the minor children shall be entitled to for their permanent support, and in what manner, how often, to whom, and until when it shall be paid; and this they may do if, from any legal cause, the wife may not be entitled to permanent alimony; and when such support shall thus be granted, the husband shall not be liable to third persons for necessaries furnished the children embraced in the verdict. Section 2981.

"The petition discloses that the husband and wife had been divorced and that the wife has ever since had the custody of the children, who were 'mere babies' when the divorce was granted. The petition is silent as to the grant of alimony to the wife for her support and that of the children. In these circumstances, construing the petition most strongly against the pleader, it is a fair presumption that the judge and jury, in granting to the wife a total divorce, made some provision for the support of the minor children. It would certainly be incumbent upon the children, who, after

the grant of the divorce, bring an action by their mother as next friend against their father for an allowance for their support, to allege facts which take their case out of the above exceptions, and in the absence of such allegations the petition does not make a case which would entitle the children to a judgment compelling the father to make an allowance for their support. . . .

"In *Joyner v. Joyner*, 131 Ga. 217, 225, 62 S. E. 182, 185 (18 L. R. A. (N. S.) 647, 127 Am. St. Rep. 220), this court held that 'alimony will not be allowed to the wife on a separate proceeding, after a total divorce has been granted at the instance of the husband.' In that case, the wife was seeking alimony in her own behalf alone. In *Hall v. Hall*, 141 Ga. 361, 80 S. E. 992, this court again approved the principle announced in *Joyner v. Joyner*, and further ruled that the wife cannot 'in her own name, and in behalf of their minor (children), obtain an order or judgment requiring her former husband to pay her alimony, or an allowance in the nature of alimony, in order that she may support' their children, 'whose custody has been awarded to her in the decree of divorce'. These decisions would be vain and without effect, if the divorced wife were permitted to bring suit in the name of minor children, who are of such tender age as to be unable to give direction or to be consulted about the institution of the proceeding, for the purpose of compelling the father to pay monthly installments of money, in the nature of alimony, which would go to his divorced wife in extinguishment of expenses paid or obligations incurred in supporting the minor children of the husband.

"Again, in *Sikes v. Sikes*, 158 Ga. 406, 123 S. E. 694, this court held that 'a minor child cannot maintain in his own name, nor by guardian or next friend, a suit for alimony, temporary or permanent, against his father, the wife and mother being dead.' The liability of the father to support his minor child is in no way terminated by the death of the mother. By such afflic-

tion the importance of the discharge of this duty by the father was rendered more imperative. We see no valid reason why, if a child cannot sue in its own name its father for support in the nature of alimony, and cannot do so by some relative or other person as next friend, it can institute such suit against the father by its mother, who has been divorced from the father, as its next friend. So we are of the opinion that this suit was not maintainable under the decisions above cited.

"In *Sikes v. Sikes, supra,* the question whether a petition in equity would lie for the recovery of an amount which the father might be required to pay for the support of his minor children was left open. In the first place, it is sufficient to say that the proceeding in the present case is no more one in equity than the one dealt with in *Sikes v. Sikes.* In that case the proceeding was brought to enforce the performance by the father of his duty to support his minor child. It is true that the petitioner prayed to have his father pay alimony for the support of the child; but this in no way affected the real purpose of the suit. The purpose of that proceeding and the proceeding in the present case is identical. The proceeding in the present case is no more one in equity than the proceeding in the *Sikes case.*

"Conceding, however, that the present proceeding is one in equity, can it be maintained in the name of these infants by their mother as next friend? In other words, *has a court of equity jurisdiction to enforce the duty of a father to support his minor children, in the absence of a statute conferring such power?* On this subject Corpus Juris says: 'But it has been held that equity has general jurisdiction of a suit by a wife to compel her husband to support their infant children, and a wife who has furnished the children with necessaries may maintain an action at law against the father to recover therefor, in jurisdictions where the wife's marital disabilities have been removed by statute. Ordinarily a minor child has no direct right of action in

equity against its parent to compel the performance of the latter's duty in respect of maintenance and education." 43 C. J. 1270, Section 50 (B). * * *.

"In support of the proposition last cited from Corpus Juris, the authors cite a number of cases in Section 50, note 92. We believe, under the cases cited in this note and other cases upon this subject, that the weight of authority is in favor of the proposition that these infants cannot, in their own name or by next friend, maintain a suit in equity against their father to compel him to furnish them with support and education, where their divorced mother has their custody and is supporting them upon the strength of her credit. Where a wife obtains a decree of divorce from her husband, and no question as to the support of the children is determined by the decree, or provision therefor made by it or by contract, the father is not relieved from his obligation to support his children; and, if he fail or refuse to discharge such obligation, the mother in an original action may recover of the father the amount of the expenditures made by her after such decree for the proper support of the children. *Hall v. Hall, supra.* This ruling is fortified by the consideration that actions by minors against their father should not be encouraged; certainly where their mother can recover from the father expenditures made by her in support of their children, where the father has not been relieved in some way from his duty to support them."

A dissenting opinion in this case, filed by Justices Hill and Beck, seems predicated on the assumption that support had not been provided for the children in the verdict or decree in the divorce proceedings, thus rendering applicable Civil Code, Section 2469, as follows: "Until such provision is made, voluntarily, or by decree or order of the court, the husband shall be liable to third persons for the board and support of the wife and for all necessaries furnished to her, or for the benefit of his children in her custody." In this

connection, and as exemplifying the reason of dissent from the majority opinion, the dissenting opinion cited *Brown v. Brown*, 132 Ga. 712, 4 S. E. 1092, to the effect that "the legal obligation of the father to support his children, and his liability to third persons for proper support furnished the children, exists after as well as before a decree of divorce granted the wife because of the misconduct of the husband, *where no support of the children is provided for in the divorce proceedings.*"

Correspondingly, of course, where such provision is made, and the father is absolved from liability for the further support of the children, there seems no reason nor justification, under any viewpoint of consideration,—either that of the majority opinion in the *Hooten case* or that of the minority opinion,—to hold the father to further liability; for, in such cases, even as to necessities furnished to the children by third persons, the father is expressly relieved from liability by the Code provision.

Gilbert v. Gilbert

(151 Ga. 520, 107 S. E. 490)

It was held in this case that the judgment and decree of divorce, awarding stated sums as permanent alimony for the wife and for the support and maintenance of the children, "was final in its nature and passed beyond the control of the court for the purposes of change and modification." After discussing applicable Georgia statutes, the opinion concluded:

> "Cases from other states, under the rulings of which the judge would be authorized to modify a decree allowing permanent alimony, will be found to have been rendered in the construction of the statutes of those states which differ from ours, and are not binding as authority here, in view of our statutes placing it within the province of the jury to fix the amount of alimony and allowance for the support of the minor children.

The amount allowable as alimony as support for the children in the instant case was *res adjudicata.*"

Robison v. Robison

(20 Ga. 521, 116 S. E. 19)

This case, in a syllabus by the court, states relevant propositions of law, concerning the custody and support of children under the Georgia statutes and the decisions construing the same, as follows:

"The father, if alive, is the natural guardian of his child. Civ. Code 1910, Section 3032. As such, it is the father's duty to provide for the maintenance and protection of the child until majority (Civ. Code 1910, Section 3020); and during such period the child remains under the control of the father, who is entitled to his services and the proceeds of his labor. Civ. Code 1910, Section 3021.

"This parental power, however, may be lost, among other ways provided by the statute, by voluntary contract, releasing the right to a third person (Civ. Code 1910, Section 3021 (1)). * * *

"Where the father's rights are, as in the instant case, thus relinquished, the parental rights and obligations devolve upon the person standing *in loco parentis. Eaves v. Fears,* 131 Ga. 820 (2), 64 S. E. 269; *Southern R. Co. v. Flemister,* 120 Ga. 524 (5), 48 S. E. 160; *Stoddard v. Campbell,* 27 Ga. App. 363 (1), 108 S. E. 311. Where a guardian of the person has been thus appointed, his power over the person of his ward is the same with the father over his child, the guardian standing in his place; and in like manner it is the duty of the guardian to protect and maintain and, according to the circumstances of the ward, to educate him.' Civ. Code 1910, Section 3058.

"Where, upon the father's relinquishment of his parental authority and control, the ordinary has appointed

a guardian of the person of a minor, the guardian is entitled to the services of his ward, and upon him, *prima facie*, devolves the duty of maintenance and education. In the instant petition against the father by one who it is alleged was thus regularly and duly appointed guardian of the person of a minor, to recover the cost of alleged necessaries furnished by the petitioner to the child, there being no special contract whereby the father assumed the duty of liability for the furnishing of the items claimed, no cause of action was stated.